Office - Supreme Court, U.S.
FILED
JUN 25 1982
ALEXANDER L. STEVAS,
CLERK

81-2382
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GARY D. SMIDDY,

Petitioner,

vs.

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE & WOEHRLE
727 West Seventh Street
Suite 430
Los Angeles, California 90017
(213) 622-4750

Counsel of Record for Petitioner

JOHN H. BISBEE
BISBEE & NAGAN
137 North Lafayette Street
Macomb, Illinois 61455
(309) 833-1797

Counsel for Petitioner

QUESTION PRESENTED

Whether a police officer who effects the unlawful arrest and detention of an individual in violation of the Fourth and Fourteenth Amendments should be afforded a presumptive immunity from liability under 42 U.S.C. §1983 for all damages suffered following the filing of criminal charges arising out of the arrest.

PARTIES IN THE COURT BELOW

Petitioner, Gary D. Smiddy, was the Plaintiff-Appellee in the court below. Respondents, Dudley D. Varney, Sidney J. Nuckles and Raymond D. Inglin, were the Defendants-Appellants below. Four other parties, Gaston Herrera, Jesus G. Aguilar, the City of Los Angeles and the County of Los Angeles, were named as defendants in the District Court but did not take part in the proceedings before the Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2a
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	9
THE OPINION OF THE COURT OF APPEALS IN THIS CASE ESTABLISHING A PRESUMPTION INSULATING THE RESPONDENTS FROM DAMAGES FOLLOWING THE FILING OF CRIMINAL CHARGES REPRESENTS A NOVEL AND SIGNIFICANT EXPANSION OF THE IMMUNITY AFFORDED TO LAW ENFORCEMENT OFFICERS WHO HAVE VIOLATED	

Page

THE CONSTITUTIONAL RIGHTS OF CITIZENS. THE CREATION OF SUCH AN IMMUNITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

CONCLUSION 25

TABLE OF APPENDICES

Page

Appendix A:
Opinion of the United States Court of Appeals for The Ninth Circuit 665 F.2d 261. A-1

Appendix B:
Order denying Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc B-1

Appendix C:
Constitutional Provisions and Statutes Involved C-1

TABLE OF AUTHORITIES

Page

Cases

Carey v. Piphurs
435 U.S. 247
98 S.Ct. 1042
55 L.Ed.2d 252 (1978) 15

Gomez v. Toledo
446 U.S. 635,
100 S.Ct. 1920,
64 L.Ed.2d 573 (1980) 10,11,22

Imbler v. Pachtman
424 U.S. 409
96 S.Ct. 984
47 L.Ed.2d 128 (1976) 11,15

Johnson v. Duffy
588 F.2d 740
(9th Cir. 1978) 17

Monell v. Department of
Social Services
436 U.S. 658
98 S.Ct. 2018
56 L.Ed.2d 611 (1978) 22

Monroe v. Pape
365 U.S. 167
81 S.Ct. 433
5 L.Ed.2d 492 (1961) 15,19

Owen v. City of Independence
445 U.S. 622
100 S.Ct. 1398
63 L.Ed.2d 643 (1980) 11,19,22

Pierson v. Ray
386 U.S. 547
87 S.Ct. 1213
18 L.Ed.2d 288 (1967) 12

Procunier v. Navarette
434 U.S. 555
98 S.Ct. 855
55 L.Ed.2d 24 (1978) 11

Scheuer v. Rhodes
416 U.S. 232
94 S.Ct. 1683
40 L.Ed.2d 90 (1974) 22

Wood v. Strickland
420 U.S. 308
95 S.Ct. 992
43 L.Ed.2d 214 (1975) 11

Statutes & Rules

28 U.S.C. § 1254(1) 2a

28 U.S.C. § 1343 5

42 U.S.C. §1983 passim

Supreme Court Rules

Rule 19.5 1,2a

Rule 20.5 1

Federal Rules of Civil Procedure

Rule 8(c) 24

United States Constitution

Amendment 4 2a

Amendment 14, §1 2a

Other Authorities

Kamisan, LaFave and Israel, Modern Criminal Procedure (5th Ed. 1980) p. 176 14

McDonald, Rossman and Cramer, Police-Prosecutor Relations In the United States (Georgetown University Law Center, 1981) 29 Criminal Law Reporter 2510-2511 (September 8, 1981) 14

Prosser, Law of Torts (4th Ed. 1971) 15,17

Restatement of Torts, 2d §440 15

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

GARY D. SMIDDY,

Petitioner,

vs.

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Gary D. Smiddy, respectfully prays, pursuant to Rules 19.5 and 20.5 of the Supreme Court Rules, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on August 7, 1981, and amended on December 21, 1981.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as amended upon Denial of Rehearing and Rehearing En Banc, is reported at 665 F.2d 261 and is attached hereto as Appendix A.

JURISDICTION

The original opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 7, 1981. The opinion was subsequently amended on December 21, 1981, at which time the Petitioner's previously filed Petition for Rehearing and Suggestion for Rehearing En Banc were denied. (See attached Appendix B). The Respondent's Petition for Rehearing in the Court of Appeals was denied on February 25, 1981.

Respondents herein have filed a Petition for Writ of Certiorari in this Court which was received by Petitioner on May 27, 1982. This Cross-Petition is timely filed pursuant to Rule 19.5 of the Supreme Court Rules within 30 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States
   Amendment 4
   Amendment 14, §1
2. The Civil Rights Act of 1871
   42 U.S.C. §1983

3. Federal Rules of Civil Procedure Rule 8(c)

The texts of the above-cited provisions are set forth in full in Appendix C attached hereto.

STATEMENT OF THE CASE

On November 15, 1973, the Petitioner, Gary D. Smiddy, was arrested at the direction of the Respondents Dudley Varney and Sidney Nuckles. Varney and Nuckles were officers of the Los Angeles Police Department who had been responsible for investigating the murder of a young woman, Linda Miller, whose body had been discovered on the morning of

October 19, 1973. Smiddy was immediately incarcerated.

The day after his arrest, a polygraph examination was administered to Smiddy by the Respondent Raymond Inglin, a Los Angeles Police Department examiner, following an agreement by the police that Smiddy would be released if he passed the test. Inglin concluded that Smiddy's responses were deceptive; he so advised Varney and Nuckles who then continued to hold the Petitioner in custody.

On November 19, 1973, four days after the arrest, a criminal complaint was filed against Smiddy charging him with the murder of Linda Miller. The Petitioner was continuously incarcerated until December 15, 1973, when he was released on bond. On

January 23, 1974, the complaint against him was dismissed in the Los Angeles County Superior Court on the grounds of insufficient evidence.

Gary Smiddy filed the instant case in the United States District Court for the Central District of California asserting that the actions of the Respondents had caused him to be deprived of his federal constitutional rights to be free from unreasonable search, seizure and restriction of liberty, as guaranteed by the Fourth and Fourteenth Amendments. His claim for relief was based on the provisions of 42 U.S.C. §1983, and federal jurisdiction rested on 28 U.S.C. §1343.

A lengthy jury trial was conducted in the district court during the course of which the Petitioner produced extensive

evidence to show that Varney and Nuckles had conducted their homicide investigation in an improper and negligent manner, resulting in Smiddy's wrongful arrest and detention without probable cause; and that Inglin had improperly administered and evaluated the polygraph examination, causing the Petitioner's continued wrongful incarceration. The facts as developed at trial are summarized at some length in Part I of the opinion of the Court of Appeals attached hereto as Appendix A. Briefly, the evidence presented by the Petitioner indicated that a fair interpretation of the facts known to the investigating officers would have led to the conclusion that Smiddy did not kill Linda Miller (Appendix A-3, A-4), that the officers had failed to examine scientific

evidence (Appendix A-4) and had failed to adequately investigate other suspects (Appendix A-4, A-5), and that the polygraph examination was deficient in several respects (Appendix A-5).

At the close of the trial, the Respondents filed a motion for directed verdict, raising for the first time the claim that the filing of the criminal complaint against the Petitioner acted as a superseding cause insulating them from liability for any damages suffered thereafter. No affirmative defense on that ground had been plead, and no proposed jury instruction on that issue was submitted. The Respondents' motion, as well as subsequent motions for judgment notwithstanding the verdict and for a new trial on the same grounds, were denied by the district court.

The jury returned a verdict finding the Respondents liable under §1983 and awarding the Petitioner damages in the sum of $250,000.

The Court of Appeals for the Ninth Circuit affirmed the judgments of liability as to each of the Respondents (Appendix A-15), holding that the Petitioner had sufficiently established the absence of probable cause for his arrest (Appendix A-7) and that the officers' "good faith" immunity defenses had been properly rejected by the jury (Appendix A-8, A-9). However, the court held in Part IV of its opinion that investigating police officers such as the Respondents are presumed to be immune from liability for damages suffered by the victim of an unlawful arrest following the filing of a criminal com-

plaint (Appendix A-10). The case was therefore remanded for a new trial on the issue of damages (Appendix A-15).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT OF APPEALS IN THIS CASE ESTABLISHING A PRESUMPTION INSULATING THE RESPONDENTS FROM DAMAGES FOLLOWING THE FILING OF CRIMINAL CHARGES REPRESENTS A NOVEL AND SIGNIFICANT EXPANSION OF THE IMMUNITY AFFORDED TO LAW ENFORCEMENT OFFICERS WHO HAVE VIOLATED THE CONSTITUTIONAL RIGHTS OF CITIZENS. THE CREATION OF SUCH AN IMMUNITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The decisions of this Court which have addressed the question of a defendant's immunity from liability for damages under 42 U.S.C. §1983 have consistently made clear that such a limitation on the remedial rights of a

civil rights plaintiff is not to be lightly imposed. As stated recently in Gomez v. Toledo, 446 U.S. 635, 638-39, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 573 (1980):

> This statute, enacted to aid in "the preservation of human liberty and human rights,"... reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees,..." As remedial legislation, §1983 is to be construed generously to further its primary purpose. (Citations omitted)

Accordingly, this Court has been willing to recognize a rule of immunity

only after a "considered inquiry" into relevant common law principles and traditions, analyzed in light of the policies and purposes of the Civil Rights Act, Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 643 (1980), and after a careful determination that, in a particular case, public policy considerations override the fundamental exceptional societal interest in compensating the innocent victims of governmental misconduct." Id. at 653, 1416. See Gomez v. Toledo, supra; Imbler v. Pachtman, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976); Wood v. Strickland, 420 U.S. 308, 318, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975). See also Procunier v. Navarette, 434 U.S. 555, 568, 98 S.Ct. 855, 863, 55

L.Ed.2d 24 (1978)(Stevens, J., dissenting).

Based upon such an analysis, this Court held in Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288 (1967), that police officers named as defendants in a §1983 action are entitled to raise a defense to liability for an unlawful arrest based upon a reasonable good faith belief that the arrest was constitutionally valid. The recognition of this qualified immunity has become a well-established rule, and the Court of Appeals held that, in the instant case, the Respondents were properly afforded the opportunity to defeat liability on that ground. (Appendix A-8, A-9).

The Court went on, however, to hold that the Respondent police officers were entitled to a further immunity, previously unrecognized by this Court or by any Court of Appeals, from damages incurred subsequent to the prosecutor's filing of a criminal charge. (Appendix A-10). This decision is unsupported by any of the inquiry and analysis which this Court has regarded as essential to the establishment of an immunity under §1983. In fact, it is respectfully submitted that the rule announced by the Court of Appeals is contrary both to basic common law principles and to the important public policy considerations which underlie the Civil Rights Act.

The holding that the Respondents' liability is limited to damages suffered by the Petitioner prior to the filing of a criminal complaint rests on a presumption that the prosecutor's action constitutes an independent determination of probable cause. (Appendix A-10).[1/] In terms of standard tort analysis, the court holds, in effect, that the filing of he charge is a "superseding cause" which insulates the defendant

---

1/ The Petitioner submits that such an assumption, relied on by the Court of Appeals as the linch-pin of its holding, is factually unwarranted based on the actual practice of prosecutors in this country. See McDonald, Rossman and Cramer, Police-Prosecutor Relations In The United States (Georgetown University Law Center, 1981) noted at 29 Crminal Law Reporter 2510-2511 (September 8, 1981) ("In 51% of jurisdictions over 100,000 population, the police still control the initial charging decisions"). See also Kamisar, LaFave and Israel, Modern Criminal Procedure (5th ed. 1980) p.176.

from liability for subsequent damage suffered by the plaintiff. (Appendix A-11, A-13). See Prosser, Law of Torts (4th Ed. 1971) pp. 270-271; Restatement of Torts, 2d §440.2/

The traditional elements of a finding of superseding cause are that the intervening action or event is both independent of the defendant's original wrongful conduct and unforeseeable as a consequence of the defendant's own actions. Restatement, supra, §442. As stated by Prosser:

2/ This Court has frequently acknowledged the general applicability of common-law tort principles to questions of the extent of liability for damages under §1983. See Carey v. Piphurs, 435 U.S. 247, 257-259, 98 S.Ct. 1042-1050, 55 L.Ed.2d 252 (1978); Imbler v. Pachtman, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 128 (1976); Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

The question is always one of whether [the defendant] is to be relieved of responsibility, and his liability superseded, by the subsequent event. In general this has been determined by asking whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated. It is therefore said that the defendant is to be held liable if, but only

if, the intervening cause is "foreseeable."

Prosser, supra, at p. 273.[3/]

The decision of the Court of Appeals in this case that the filing of criminal charges following an unlawful arrest presumptively constitutes a superseding cause and that the Respondents are accordingly entitled to a presumption of

---

3/ A similar test of reasonable foreseeability regarding the acts of third parties has been recognized in the Ninth Circuit as governing the scope of liability in a §1983 action:

> Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir. 1978).

immunity thereafter, is patently inconsistent with this basic common-law rule. Logically, the decision of a prosecutor to file charges, even assuming an exercise of independent judgment with respect to probable cause based on the facts presented, cannot be severed from the actions of the officers who investigate, prepare and present the case for filing. This is particularly true when, as here, the plaintiff's claim of wrongfulness of the conduct of the police officers rests substantially on their failure to pursue information or to develop evidence relevant to the question of probable cause and on their distortion of facts which were developed in the investigation. (Appendix A-3, A-4).

Moreover, it cannot be said that the institution of criminal proceedings is

an unforeseeable result of an unlawful arrest. To the contrary, as a rule the later filing of criminal charges is a specific goal of the arresting officer. In light of these considerations, the decision of the Court of Appeals cannot be reconciled with this Court's holding in Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

The holding in this case is equally inconsistent with relevant considerations of public policy and with the important societal interests served by the private damages remedy provided under the Civil Rights Act. See Owen v. City of Independence, supra, 445

U.S. at 650, 100 S.Ct. at 1415. By reason of the qualified immunity already afforded them under well-established law, police officers such as the Respondents enjoy substantial freedom and protection from liability in the exercise of their official duties. It is only when, as here, their conduct is found to fall outside the bounds of reasonableness and good faith that they can be held responsible to compensate an individual for a constitutional injury. The decision of the Court of Appeals expands the scope of immunity for police officers so as to limit their liability for all but the most minimal damages suffered as the result of an unlawful arrest.

As a justification for this rule, the Court of Appeals relies on the fact

that other persons whose conduct may also contribute to a plaintiff's unlawful detention and injury, notably the prosecutor and the judge, are absolutely immune from liability under §1983. (Appendix A-11). This fact merely serves, however, to underscore the far-reaching significance of the court's holding. Henceforth, a plaintiff whose constitutional rights are violated by police officers who effect an unlawful arrest which later leads to the filing of formal criminal charges will be left without recourse for recovery of a substantial portion of the damages

suffered as a result of that violation.4/

In rejecting the establishment of a good faith immunity rule with respect to governmental entities in Owen v. City of Independence, supra, this Court addressed a similar situation:

> [O]wing to the qualified immunity enjoyed by most government officials, see Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683,

---

4/ The court suggests the theoretical possibility of absolute liability on the part of a municipality as a further justification for the creation of the immunity for police officers. Clearly, however, the present state of the law does not allow for recovery against a government entity under §1983 except in the extraordinary event that the plaintiff could establish that his own unlawful arrest was made pursuant to a governmental policy or custom approving such conduct on the part of individual officers. See, Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

> 40 L.Ed.2d 90 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. 445 U.S. at 651. 100 S.Ct. at 1415-1416.

The conflict between such an analysis and the decision in the court below is obvious and inescapable.

The radical nature of the lower court's departure from applicable principles and guidelines established by this Court's decisions is further demonstrated by the manner in which the opinion holds that the newly-created presumption of immunity is to operate. The Petitioner

argued below that the Respondents' failure to plead the issue as an affirmative defense or to raise it prior to the close of the trial precluded them from asserting that the filing of the criminal complaint acted to cut off their liability for damages. In rejecting this argument, the Court of Appeals held that the burden rests with the plaintiff to anticipate the defense and to rebut the presumption of prosecutorial independence upon which the defendants' immunity from damages is premised. (Appendix A-12).

This holding conflicts with this Court's recent decision in Gomez v. Toledo, supra, 446 U.S. at 640, 100 S.Ct. at 1924, that the burden of raising a defense of good faith immunity rests with the defendant in a §1983 action. See Rule 8(c), Federal Rules of

Civil Procedure. Such a rule is reasonable because the establishment of a qualified immunity defense "depends on facts peculiarly within the knowledge and control of the defendant." Id. The same is unquestionably true with respect to the issue of an immunity based on facts relating to the independence, or lack of independence, of a prosecutor's charging decision following an arrest. The creation of a presumption of immunity which must be overcome in the first instance by the plaintiff under these circumstances imposes a burden which in many instances will be impossible for the citizen wrongfully subjected to an unconstitutional deprivation of liberty to meet.

CONCLUSION

For the foregoing reasons the Peti-

tioner respectfully submits that the importance of the question raised by the holding of the Court of Appeals and the conflicts between that ruling and the applicable decisions of this Court compel review by this Court. It is therefore respectfully requested that a writ of certiorari be granted and that the portion of the Judgment of the Court of Appeals vacating the award of damages and remanding for a new trial be set aside.

Dated: June 25, 1982.

Respectfully submitted,

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE & WOEHRLE

Counsel of Record for Petitioner

JOHN H. BISBEE
BISBEE & NAGAN

Counsel for Petitoner

APPENDIX A

APPENDIX A

OPINION OF THE COURT OF APPEALS, 665 F.2d 261

Gary D. Smiddy, Plaintiff-Appellee v. Dudley D. Varney, Sidney J. Nuckles, Raymond D. Inglin, Gaston Herrera, Jesus C. Aguilar, The City of Los Angeles, California, a Chartered City, and the County of Los Angeles, California, Defendants-Appellants. Nos. 79-3078, 79-3480.

United States Court of Appeals, Ninth Circuit, decided August 7, 1981, as amended on Denial of Rehearing and Rehearing En Banc December 21, 1981.

Michael Lightfoot, Los Angeles, California, for Smiddy; Carla M. Woehrle, Talcott, Vandevelde & Woehrle, Los Angeles, California, John H. Bisbee, Bisbee & Nagan, Macomb, Ill., on brief.

Tom Todd, Kentfield, California, for Varney, etc.

Appeal from the United States District Court for the Central District of California.

Before WALLACE and SNEED, Circuit Judges, and CLAIBORNE*, District Judge.

---

* Honorable Harry E. Claiborne, Chief Judge of the United States District Court for the District of Nevada, sitting by designation.

SNEED, Circuit Judge:

Gary Smiddy was arrested in 1973 and charged with the murder of Linda Miller. After the charge was dropped for insufficient evidence, he brought suit under 42 U.S.C. §1983 against employees of the Los Angeles Police Department. After trial, the district court entered judgment on a jury verdict awarding him $250,000. The district court added $250,000 in attorney's fees. The appellants, two sergeants and a polygraph examiner, challenge the judgment on numerous grounds. We reject their arguments that the district court should have directed a verdict in their favor and that the jury instructions were improper. But we conclude that the district court erred in refusing to hold that they were not liable for damages incurred after a district attorney, exercising his independent judgment, filed charges. We therefore reverse and remand for a new trial on the issue of damages. On remand, a reconsideration of the amount of the attorney's fees also will be necessary.

I.

FACTS AND BACKGROUND

Linda Miller's body was found on Friday morning, October 19, 1973, at approximately 7:30 a.m., in the storage room of a construction site in the Venice area of Los Angeles. She had been strangled. She was last seen alive in public at about 5:00 a.m. Thursday morning, when she left a coffee shop with Gary Smiddy. Smiddy claims they went from the coffee shop to his apartment in separate cars, where they stayed until she left on Thursday afternoon. Smiddy was with friends from about 5:00 p.m. Thursday until Miller's body was discovered.

Defendants Varney and Nuckles, experienced homicide investigators, arrested Smiddy on November 15, 1973. At that time they knew that Miller had last been seen with Smiddy, that she had not reported to her job as a waitress on Thursday evening, and that she was found dead wearing the same clothes she had on when she left the coffee shop. They thought Smiddy might have murdered Miller after leaving the coffee shop at 5:00 a.m. Thursday morning and before workmen arrived at the construction site at 7:30 a.m. that day. A coroner, Dr. Gaston Herrara, said that she could have been dead for 30 hours before her body was discovered. Other information pointing toward Smiddy was that a neighbor had reported that Miller's car was parked near the construction site for a few days before it was found, a sergeant who observed the body at the construction site told Varney and Nuckles that the smell indicated that she had been dead for about a day, and a construction foreman said the body could have been in the storage room Thursday without being discovered. In addition, they had been told that Miller referred to Smiddy as "John" at the coffee shop, which was significant because she had told a number of persons that she was afraid of a man named John with whom she lived and who she said had threatened her. Also, although the police officers had been told that Smiddy knew they would like to speak with him, he had not contacted them.

The Plaintiff produced an array of evidence at trial designed to show that it was unlikely that he killed Miller and that Varney and Nuckles conducted their inquiry negligently. For example, the autopsy revealed that Miller had eaten spaghetti shortly before her death, but no one at the coffee shop remembered her eating spaghetti before she left with Smiddy. Her car was parked illegally and received

a ticket on Friday morning but none on Thursday, making it unlikely that her car had been parked near the construction site that day. A construction worker told them it was inconceivable that Miller's body was in the storage room all day Thursday. And someone who was shown Miller's picture thought she had been in a bar Thursday night. The Plaintiff also argued that Varney and Nuckles should have examined scientific evidence such as blood found in the storage room and seminal fluid found in Miller's vagina more carefully.

Perhaps most persuasively, the Plaintiff argued that Varney and Nuckles failed to investigate other suspects adequately, including two former boyfriends named John. Miller had moved out of her apartment because a former boyfriend was harassing her, and she had told a number of friends that the former boyfriend had said that if he could not have her then no one could. The Plaintiff presented evidence at trial that a man named John Cook, whom Varney and Nuckles never contacted, made that statement. The Plaintiff also argued that the investigation of John Scroggin was deficient. Miller had lived with Scroggin in San Luis Obispo, and he had reportedly beat her and followed her to Los Angeles. Varney and Nuckles did investigate Ronald Varella, who had also lived with Miller and reportedly beat her. Smiddy complained because Varney and Nuckles dropped their investigation of Varella after they arrested him.

The Plaintiff also suggested at trial that the police officers should have investigated Steve Dunne, who might have had a date scheduled with Miller on the night before her body was found, and Andy Rawn, with whom Miller had engaged in oral sexual relations at lunchtime on the Wednesday before her death, more carefully. The Plaintiff

argued that Dunne had lied to the police officers and that Miller may have attempted to blackmail Rawn, warranting further investigation of each.

The day after Varney and Nuckles arrested Smiddy, Defendant Inglin administered a polygraph examination of him. Inglin was the president of the California Association of Polygraph Examiners at that time. A deal had been struck such that the police would release Smiddy if he passed the test, but Inglin concluded that Smiddy responded to his questions deceptively. In response to complaints about his examination of Smiddy, Inglin appointed a committee of past presidents of the Association in 1974 to evaluate the examination. The committee concluded that the test was administered deficiently, and the Association subsequently censured Inglin for the way he tested Smiddy.

On November 19, 1973, four days after the arrest, the district attorney filed a criminal complaint charging Smiddy with the murder of Linda Miller. A preliminary hearing was held in municipal court, and Smiddy was bound over to the superior court on December 14. The superior court dismissed the complaint for insufficient evidence on January 23, 1974.

Smiddy filed this section 1983 suit in 1976, alleging that the arrest and incarceration violated his civil rights. Following a lengthy jury trial in 1978, he was awarded $250,000 in damages from Varney, Nuckles and Inglin. The jury found that the coroner, Dr. Herrera, was not liable to Smiddy. [1/] The district court awarded the Plaintiff

---

1/ Another coroner, Jesus Aguilar, had been dismissed from the case previously. The Plaintiff also named the City and County of Los Angeles as defendants in his complaint. Smiddy only sought equitable relief against the municipal defendants. After trial, the court granted Plaintiff's motion that they expunge from their files all records of Smiddy's arrest. We note

(continued)

$250,000 in attorney's fees under the Civil Rights Attorney's Fees Act of 1976, which amended 42 U.S.C. §1988 to permit courts to award reasonable attorney's fees to the prevailing party in section 1983 actions. Varney, Nuckles and Inglin appeal.

II.

THE MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

Varney and Nuckles requested a directed verdict in their favor at the close of evidence, arguing that the evidence showed that probable cause existed for Smiddy's arrest as a matter of law. Inglin requested a directed verdict on the theory that his polygraph examination was not a proximate cause of Smiddy's damages. These requests were renewed in motions for judgment notwithstanding the verdict. We hold that the district court correctly denied these motions.

Whether probable cause existed for Smiddy's arrest is a close issue. But in reviewing the denial of a directed verdict in favor of a defendant, we must view the evidence in a light most favorable to the Plaintiff. ***Maheu v. Hughes Tool Co.***, 569 F.2d 459, 464 (9th Cir. 1977). Giving the

---

1/ (continued) that if this case were brought today the Plaintiff would likely seek damages from the municipal defendants. *See* ***Monell v. Department of Social Services***, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipal corporations may be liable under section 1983 if injury resulted from a governmental policy or custom); ***Owen v. City of Independence***, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (municipal corporations are not protected in section 1983 suits by the immunities of their employees).

Plaintiff the benefit of all reasonable inferences that may be drawn from the evidence presented during the course of the twenty-three day trial, sufficient evidence existed to support the jury's conclusion that there was no probable cause for the arrest.

It is not possible to summarize concisely all of the evidence presented on this issue since much of the trial was devoted to the issue of whether probable cause existed. But, as indicated above, there was conflicting evidence about what the police officers knew and what other leads they should have pursued. In *Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978), we stated that if "reasonable persons might reach different conclusions about the facts, the establishment of those facts is for the jury, and the existence of probable cause is likewise for the jury, upon a proper instruction about the law." *Id.* at 247. The district court was correct under this standard in submitting the issue to the jury, which decided the issue in favor of Smiddy. We will not upset that decision.

Nor can we say that there was not sufficient evidence to conclude that Inglin's polygraph examination was a proximate cause of Smiddy's damages. Inglin argues that even if his examination had been conducted properly the results would have been inconclusive. But it is not clear what Varney and Nuckles would have done had Inglin reported that the test was inconclusive. Varney testified that Inglin's conclusion that Smiddy was deceptive was a factor in the decision to hold him. Therefore, sufficient evidence existed to support the jury's conclusion that the polygraph examination was a proximate cause of Smiddy's continued incarceration, and the district court did not err in refusing to direct a verdict in Inglin's favor.

III.

THE JURY INSTRUCTIONS

The sergeants and Inglin both challenge the jury instructions. Our standard of review is that we will reverse a judgment because of a mistake in jury instructions only if the error was prejudicial. We look to the entire jury charge, which in this case was quite lengthy, to determine whether the instructions fairly stated the legal principles to be applied by the jury. *Sanderson v. Chapman*, 487 F.2d 264, 267 (9th Cir. 1973); *Nitto Shosen K. K. v. Johnson*, 350 F.2d 399, 400 (9th Cir. 1965). We conclude that the district court's jury instructions pass muster.

The court instructed the jury that Inglin could be found liable if he conducted and interpreted the polygraph examination improperly and rendered an incorrect conclusion. The jury was further instructed that Inglin could not be liable if he acted with a reasonable good faith belief that his conduct would not violate Smiddy's constitutional rights. Inglin complains that the instructions did not spell out the meaning of "improperly." But reading the instructions in their entirety, we conclude that it was clear that the jury was to use the appropriate "reasonably prudent person" test. Inglin also complains that an instruction should have been given that he was to be held to the "special skill and care" standard for experts and professionals. But it is not clear why he would want to be held to this higher standard, especially since he was censured by the California Association of Polygraph Examiners for the way he tested Smiddy.

The crucial issue concerning the instructions regarding Varney and Nuckles is whether the jury understood that

they might not be liable under section 1983 even if the jury concluded that probable cause for the arrest did not exist. Under *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), police officers have a qualified immunity under section 1983 such that they are shielded from liability if they reasonably believe in good faith that their actions are constitutional. *Id.* at 557, 87 S.Ct. at 1219. Thus, to recover the Plaintiff must clear two hurdles: probable cause must be shown not to have existed; the officers must be shown not to have reasonably believed in good faith that probable cause did exist. *See Allen v. McCurry*, ____ U.S. ____, 101 S.Ct. 411, 419 n.18, 66 L.Ed.2d 308 (1980); *Midwest Growers Cooperative Corp. v. Kirkemo*, 533 F.2d 455, 463 (9th Cir. 1976); *Mark v. Groff*, 521 F.2d 1376, 1379-80 (9th Cir. 1975). It is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they "cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d Cir. 1972) (Lumbard, J., concurring).

The instructions in this case first defined probable cause and later stated: "[A] defendant who acts in good faith and with a reasonable belief that his conduct is constitutional, cannot be found liable under Section 1983." Therefore, although the "two-hurdle" requirement was not as sharply etched in the instructions as it might have been, the issues were fairly put to the jury, which must have concluded both that probable cause was lacking for Smiddy's arrest and that Varney and Nuckles did not reasonably believe in good faith that probable cause existed.

IV.

DAMAGES INCURRED AFTER THE DISTRICT ATTORNEY FILED THE CHARGE

At the close of the trial the Defendants moved for a partial directed verdict that they were not liable for any damages suffered after November 19, 1973 because the filing of the criminal complaint by the district attorney insulated them from liability for damages suffered subsequently. They repeated this argument in a Motion for Judgment Notwithstanding the Verdict and for a new trial. These Motions were denied. They also requested a jury instruction stating that the district attorney bears responsibility for gathering evidence to convict or exonerate an arrested person after the filing of a criminal complaint, and that instruction was denied.

The district court erred. Filing of a criminal complaint immunizes investigating officers such as the Appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time. This presumption may be rebutted, however. For example, a showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption. These examples are not intended to be exclusive. Perhaps the presumption may be rebutted in other ways.

Authorities from other circuits lend some support for this position. Thus it has been held that the filing of

charges under certain circumstances does break the chain of causation between an arrest and prosecution. *See Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc). 2/

Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted. This result is just because the other actors who decided to continue to hold Smiddy, the district attorney and the municipal court judge, are absolutely immune from liability under section 1983. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128

2/ In *Rodriguez*, the plaintiff sued arresting officers for a false arrest pursuant to a grand jury indictment. The court held that the action should be dismissed, stating: "[I]f the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain. . . ." 556 F.2d at 1193. In *Dellums*, a false arrest verdict against a police chief was affirmed, but a malicious prosecution verdict was vacated and a new trial was ordered. The court stated: "The law is clear that the chain of causation is broken — thereby defeating tort liability — if the decision made by Attorney Moore [to prosecute] was independent of any pressure or influence exerted by Chief Powell. . . ." 566 F.2d at 192-93. And in *Ames*, the court, citing *Rodriguez* and *Dellums*, held that: "[A]bsent any specific allegation, such as the presentation of false evidence or the withholding of evidence, the grand jury indictment breaks any chain of causation linking the employees' activities to the institution of criminal proceedings, thus insulating the FBI and Justice Department employees from tort liability." 600 F.2d at 185.

(1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.288 (1967) (judges). A police officer's lot already is unfortunate because it is he who often is the only actor in the chain of decisions leading to prosecution who is subject to section 1983 liability. We need not make it more unfortunate by holding the officer liable for damage that is the result of the intervening fault of others in the chain. The existence of the possiblity of absolute liability on the part of the municipality or governmental unit further underscores the justice of limiting the liability of the police officers. *See* Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?: Owen v. City of Independence*, 55 St. John's L.Rev. 153 (1980).

The Plaintiff argues that even if the filing of the criminal complaint normally insulates police officers from liability for subsequent damages, the Defendants have waived the argument in this case because they failed to plead it as an affirmative defense as required by Rule 8 of the Federal Rules of Civil Procedure. We disagree. In California, "Once the district attorney has filed a complaint, it is his responsibility to gather and present such evidence as will convict the guilty or exonerate the innocent." *Tribulski v. County of Los Angeles*, 83 Cal.App.3d 828, 831, 146 Cal.Rptr. 229 (1978). There is a presumption of independence on the part of the district attorney where Plaintiff has not presented evidence to challenge that presumption. For example, Plaintiff might contend that the prosecutor acted under pressure from the police or relied on the police investigation and arrest when he filed the complaint, instead of making an independent judgment on the existence of probable cause for the arrest. *See Ames, supra.* Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an

independent intervening cause cuts off his tort liability. Fed. R. Evid. 301. If for reasons of privilege or otherwise the relevant evidence is not available, no presumption will arise.

On remand, then, a new inquiry must be made into the issue of damages. At trial, the Plaintiff presented evidence concerning the damage he suffered as a result of his incarceration, including psychological damage and the loss of a prospective job. The jury returned a general verdict that did not specify how the award was calculated. We hold that the Defendants are liable for the damage suffered from the time of Smiddy's arrest until the district attorney filed the charges, approximately four days. But they are not liable for Smiddy's damages due to his incarceration from the time of the filing until his release on bail following the preliminary hearing, approximately four weeks, unless the Plaintiff rebuts the presumption of independence on the part of the district attorney. Whether the loss of the job opportunity was proximately caused by the arrest by the Defendants or the incarceration subsequent to filing of the charges is properly considered in the first instance by the trier of fact. Likewise, determining whether the arrest itself proximately caused any psychological damage must be considered on remand. *See Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355-58 (9th Cir. 1981) (discussion of proximate causation and federal civil rights actions).

V.

ATTORNEY'S FEES

The Defendants do not challenge the amount of the attorney's fees award, which were designed to compensate the four attorneys who represented Smiddy at their normal rates of $65 to $100 an hour for professional legal work and $25 an hour for law clerks' time. Rather, they appeal the fact that an award was made. We reject their arguments. Nonetheless, we conclude that if damages are substantially reduced on remand the court should reconsider the amount of the attorney's fees award.

Our standard of review for an award of attorney's fees under 2 U.S.C. §1988 is the abuse of discretion standard. *Sethy v. Alameda County Water District*, 602 F.2d 894, 897 (9th Cir. 1979). Contrary to the Defendants' arguments, it is not an abuse of discretion for a district court to award attorney's fees because the Plaintiff was awarded damages, *id.*, accepted a contingent fee arrangement, *Buxton v. Patel*, 595 F.2d 1182, 1185 n.3 (9th Cir. 1979), or did not proceed by means of a class action, *id.* The district court must be guided by the factors listed in *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978). The district court in this case considered those factors, among which are the amount of damages involved and the results obtained. If on remand the amount of damages is reduced and thus the results obtained are less favorable to the Plaintiff, the district court should reconsider the amount of the attorney's fees award in light of all of the *Fountila* factors.

VI.

DISPOSITION OF APPEALS

The judgment of liability with respect to each appellant is affirmed, but the amount of the judgment is vacated, and the case is remanded for a new trial on the issue of damages to be conducted in accordance with this opinion. Following that trial a reconsideration of the amount of attorney's fees will be in order.

Affirmed in Part; Judgment Vacated and Remanded.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gary Smiddy,
Plaintiff-Appellee

v.

Dudley D. Varney, et al.,
Defendants-Appellants.

Nos. 79-3078
79-3480

Filed December 21, 1982
Clerk, U.S. COURT OF APPEALS

Before: Wallace and Sneed, Circuit Judges, and Claiborne*, District Judge.

The panel in the above-entitled case will amend its August 7, 1981 opinion as follows.

---

* Honorable Harry E. Claiborne, Chief Judge of the United States District Judge for the District of Nevada, sitting by designation.

1. The first three sentences of the third paragraph in Part IV, 652 F.2d at 871-72, are changed to read, "Authorities from other circuits lend some support for this position. Thus it has been held that the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution. See Ames ...."

2. The first sentence of the fourth paragraph in Part IV, 652 F.2d at 872, is changed to read, "Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted."

3. The last sentence of the fifth paragraph in Part IV, id., is changed to read, "There is a presumption of independence on the part of the district attorney where plaintiff has not presented evidence to challenge that presumption. For example, plaintiff might (1) contend that the prosecutor acted under pressure from the police or (2) relied on the police investigation and arrest when he filed the complaint, instead of making an independent judgment on the existence of probable cause for the arrest. See Ames, supra. Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an independent intervening cause cuts off his tort liability. Fed. R. Evid. 301. (3) If for reasons of privilege or

otherwise the relevant evidence is not available, no presumption will arise."

4. Footnote number 2 is deleted.

With the Opinion so amended, the panel, pursuant to General Order 5.4(b), has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particucularly describing the place to be searched, and the persons or things to be seized.

Amendment 14, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction threof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 8(c), Federal Rules of Civil Procedure:

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence,

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2382

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GARY D. SMIDDY,

Petitioner,

vs.

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ILA REISER
City Attorney of Los Angeles
JOHN E. NEVILLE
Senior Assistant City Attorney
RICHARD E. [illegible]
Assistant City Attorney

Room 1700 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-5625

Attorneys for Respondents

QUESTION PRESENTED

Whether City Police Officers who provide their investigative file concerning a suspected crime to a separate and independent county prosecutor's office, who act non-maliciously and non-recklessly but whose investigation may later be found by a jury to have been conducted negligently, are liable under 42 USC 1983 for damages emanating from the independent judgment of the prosecutor's office to file and prosecute criminal charges.

TOPICAL INDEX

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. iii

INTRODUCTION. 2

SUPPLEMENTAL STATEMENT OF THE CASE 4

ARGUMENT. 14

I. THIS CASE POSES NO NOVEL OR UNPRECEDENTED PRINCIPLES BUT SIMPLY SETS FORTH WELL ESTABLISHED COMMON LAW RULES CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS 14

II. THE COURT OF APPEALS VACATION OF THE DISTRICT COURT JUDGMENT ON THIS ISSUE APPROPRIATELY DISPOSED OF THE ISSUE CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS 18

III. THE ISSUE OF LIABILITY OF THE RESPONDENTS FOR DAMAGES AFTER INSTITUTION OF JUDICIAL PROCEEDINGS WAS PROPERLY RAISED AND LITIGATED BELOW. 25

CONCLUSION. 32

TABLE OF AUTHORITIES

Federal Cases	Page
Ames v. United States (8th Cir. 1979) 600 F.2d 183.	16,17
Dellums v. Powell (D.C. Cir. 1977) 566 F.2d 167.	17,27
Everett v. City of Cheater (E.D. Pa. 1975) 391 F.Supp. 26, 28.	17
Gallegos v. Stokes (10th Cir. 1979) 593 F.2d 372.	29
Gomez v. Toledo (1980) 446 U.S. 635, 64 L.Ed.2d 573, 100 S.Ct. 1920.	26
Hoffman v. Halden (9th Cir. 1959) 268 F.2d 280.	17
Imbler v. Pachtman (1977) 424 U.S. 409; 47 L.Ed.2d 128, 96 S.Ct. 984	19
Mundy v. State of Georgia (5th Cir. 1978) 586 F.2d 507.	16,17
Pearson v. Ray (1967) 386 U.S. 547; 18 L.Ed.2d 288; 87 S.Ct. 1213	19
Quinn v. Southwest Wood Products Inc. (5th Cir. 1979) 597 F.2d 1018	31

FEDERAL CASES (Cont'd) Page

Rodriguez v. Ritchey (5th Cir. 1977)
556 F.2d 1185 17

Slavitt v. Kauhi (9th Cir. 1967)
384 F.2d 530. 29

STATE CASES

Belt v. Ritter (Mich 1969)
18 Mich.App.495; 171 N.W.2d 581 . 24,25

Belt v. Ritter (Mich 1971)
385 Mich 402, 189 N.W.2d 221. . . . 24

Tribulski v. County of Los Angeles
(Cal. 1978) 83 Cal.App.3d 828
146 Cal.Rptr 229. 10

White v. Towers (Cal. 1951)
37 Cal.2d 727, 235 P.2d 209
28 A.L.R. 2d 636. 23

TREATISES

Annotation (1952)
21 A.L.R. 2d 643, 662-65
674-79. 17

Annotation (1953)
28 A.L.R. 2d 646. 20,21,22,23

2A Moore's Federal Practice
(2nd Ed. 1979)
para. 8.19[1], p. 8-221. 26,27

TREATISES (Cont'd) **Page**

2A Moore's Federal Practice
(2nd Ed. 1979)
para. 8.19[1], pp. 8-220 - 8-221 . 29

3 Moore's Federal Practice
(2nd Ed. 1979)
para. 5.13[2] pp. 15-165 29

Prosser, The Law of Torts
(4th Ed. 1971) pp. 836-37,
837-38. 17,23

Restatement (Second) of Torts
(1977) Section 653, comment
(d) pp. 407-08. 17

Restatement (Second) of Torts
(1977) section 653, comment
(e) p. 408. 19

RULES

Rule 8(c) Federal Rules of
Civil Procedure 26

No. 81-2382

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GARY D. SMIDDY,

Petitioner,

vs.

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN

Respondents.

BRIEF IN OPPOSITION TO
CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The United States Court of Appeals for the Ninth Circuit having ordered remand of the issue raised by the Cross-Petition of Petitioner Gary Smiddy, to the District Court for further proceedings, Respondents Dudley D. Varney, Sidney J. Nuckles and Raymond D. Inglin submit that the Cross-Petition

for Writ of Certiorari need not be entertained by this Court at the current stage of the proceedings.

INTRODUCTION

Petitioner's complaint in the District Court alleged among other things that respondent police officers maliciously initiated criminal proceedings against him, however, he never presented sufficient evidence to establish this allegation. Instead, petitioners evidence in the trial below at best demonstrated that the officers were negligent in investigating him. Because the evidence was thus insufficient to permit damages after the institution of the criminal proceedings by the District Attorney, respondents moved for a directed verdict and later

for a new trial and judgment notwithstanding the verdict on this issue, all of which were denied by the trial court. Respondents also attempted to persuade the trial court to give an instruction upon the respective function of the police and District Attorney, however, this instruction was rejected.

Although the decision of the Court of Appeals poses issues which should be resolved by this Court, respondents believe that by vacating and remanding the District Court judgment the Court of Appeals achieved the appropriate disposition of the specific narrow question raised in the Cross-Petition for Writ of Certiorari. This is not to say that the Courts holding achieves what respondents feel should be the

correct ultimate disposition of this matter. Respondents petitioned for Certiorari on the basis of their disagreement with much of the Circuit Court's opinion. Petitioner however, did not in any event, produced evidence sufficient to render the respondent police officers liable for malicious prosecution or to show that the officers rather than the District Attorney initiated the criminal prosecution of which petitioner complained in the trial court. The Court of Appeals thus correctly vacated the judgment as to this specific issue.

SUPPLEMENTAL STATEMENT OF THE CASE

In 1976 petitioner filed an action in the United States District Court for

the Central District of California pursuant to 42 U.S.C. §1983 alleging that he was arrested and incarcerated by the respondents in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. (C.T. 3, C.T. 91) His First Amended Complaint asserted that the respondents negligently, intentionally, wilfully, maliciously and in bad faith deprived him of numerous rights including:

> "(a) The right to unrestricted ability to travel, as well as the rights of movement and association, all secured by the First and Fourteenth Amendments to the Constitution of the United States;

"(b) The right to be secure in his person and effects against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the Constitution of the United States;

"(c) The right to be confronted by the witnesses against him, and to have the assistance of counsel for his defense under the Sixth and Fourteenth Amendments to the Constitution of the United States;

"(d) The right not to have cruel and unusual punishments inflicted upon him under the Eighth and Fourteenth Amendments to the Constitution of the United States;

"(e) The right to freedom from unlawful arrest and from unlawful detention and imprisonment as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States;

"(f) The right not to be deprived of life, liberty or property without due process of the law, and the right to equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States;

"(g) The right to be secure in his person without unlawful encroachments upon his privacy and life, as secured by the First, Fourth, Ninth and Fourteenth

Amendments to the Constitution of the United States." (C.T. 98-99)

In paragraph 19 of his First Amended Complaint petitioner alleged "that the formal institution of criminal proceedings against the plaintiff and the decision of the judge of the Municipal Court to hold the plaintiff to answer in Superior Court were the direct and proximate results of the negligent, malicious, intentional and bad faith actions of defendants DUDLEY VARNEY, SIDNEY J. NUCKLES, RAYMOND INGLIN. . ." (C.T. 95.) Respondents denied every allegation in this paragraph. (C.T. 112.)

Respondents answered the complaint denying that they had violated any rights of petitioner (C.T. 111-112). In

various affirmative defenses asserted within the answer, respondents contended that they were duly appointed police officers engaged in the performance of their regularly assigned duties as police officers, that there existed probable cause to arrest and detain the plaintiff, and that their acts were lawful, proper, reasonable, and legal. (C.T. 113.)

Among other things, respondents raised as an affirmative defense that they at all times acted in good faith without malice and within the scope of their duties as police officers of the City of Los Angeles. (C.T. 113.) The scope of the duties of police officers in California does not entail the filing or prosecution of criminal cases.

(Tribulski v. County of Los Angeles (1978) 83 Cal.App.3d 828.)

The trial of this case involved in its final analysis the award of damages against these police officers for what a jury ultimately determined to be negligence. It is important in this regard to remember that the central contentions of the petitioner and the instructions to the jury did not require that liability be based upon a showing of reckless or intentional misconduct by the officers. (Cross-Petition Appendix A-3, A-4, 22 R.T. 3867, 24 R.T. 4151-55) In the trial of the case petitioner attempted to show that the police investigation of his involvement in the murder of Linda Miller was conducted negligently and the instructions of the

trial court revolved around the issue of whether or not the police officers had been negligent. (24 R.T. 4151-55) The evidence at trial would indicate that although some facts pointed to the petitioner as a suspect others detracted from this proposition (Cross-Petition Appendix A-3, A-4). Although a good deal of scientific evidence was examined during the investigation the petitioner argued that respondents Varney and Nuckles should have examined two items of scientific evidence more carefully. (Cross-Petition Appendix A-4). Finally the petitioner argued that the officers were remiss in not pursuing all avenues of the investigation that may have been open to them at the time they were investigating him. Specifically he

listed a number of other potential suspects which he contended the officers should have more fully investigated. (Cross-Petition Appendix A-4, A-5)

The contentions of the parties at trial concerning the conduct of the officers, revolving around dizzing investigative schedules, twelve hour work days, and seven day work weeks closely resembled an action for professional malpractice in the conduct of an extensive and complicated homicide investigation.

The petitioner sought damages for attorneys fees, bail bond costs, emotional distress etc., resulting from the District Attorney's determination to prosecute the petitioner and the Municipal Court's determination to hold

him to answer for the charges. (23 R.T. 3950:12 - 3965:3.) The petitioner did not and could not show that the officers possessed any control over the ultimate decisions of the District Attorney or the Municipal Court Judge.

Under the trial court's charge to the jury, once the jury had decided upon liability it was permitted to award damages against the officers for the emotional distress occasioned by the actions of the District Attorney and the Municipal Court and further, for expenses for attorneys fees, bail, and other costs associated with his criminal prosecution. (24 R.T. 4158-59)

ARGUMENT

I.

THIS CASE POSES NO NOVEL OR UNPRECENDENTED PRINCIPLES BUT SIMPLY SETS FORTH WELL ESTABLISHED COMMON LAW RULES CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS

What cross-petitioner has termed a new immunity is simply the application of a principle long established in the common law. That is that when a person simply relates what he or she knows concerning suspected criminal activity to a prosecutor and such a prosecutor acts upon this information exercising his or her independent judgment, such conduct, without more, cannot be a basis

for liability resulting from the criminal prosecution. Stated another way the determination to file a criminal complaint made by the District Attorney's Office was an independent, intervening, superceding act insulating respondents from liability for any damage suffered by the petitioner thereafter.

Respondents moved for a directed verdict, a new trial, and judgment notwithstanding verdict on this ground in the trial court. (C.T. 274, 341-42)1/ Even assuming arguendo that the evidence would have been sufficient to

---

1/Respondents also contended in their motions for directed verdict, new trial and judgment notwithstanding verdict that the decision of the municipal court judge that petitioner be held to answer insulated them from liability for damages. (C.T. 274-75, 342.)

support a finding by a reasonable jury that petitioner's arrest was without both probable cause and a reasonable belief that probable cause existed, it seems to respondents that it was still error for the district court to deny these motions.

For respondents to incur liability for damages suffered by petitioner after the district attorney filed the criminal complaint, there must be substantial evidence that respondents instigated the filing of the criminal complaint, that is, did more than merely state what they believed, leaving the decision to prosecute entirely to the uncontrolled discretion of the district attorney's office. (See Ames v. United States (8th Cir. 1979) 600 F.2d 183, 185-86; Mundy

v. State of Georgia (5th Cir. 1978) 586 F.2d 507, 508; Dellums v. Powell (D.C. Cir. 1977) 566 F.2d 167, 192-93; Rodriguez v. Ritchey (5th Cir. 1977) 556 F.2d 1185, 1193 (en banc); Hoffman v. Halden (9th Cir. 1959) 268 F.2d 280, 296-97; Everett v. City of Chester (E.D. Pa. 1975) 391 F.Supp. 26, 28; Restatement (Second) of Torts (1977) section 653, Comment (d), pp. 407-08; Prosser, The Law of Torts (4th ed. 1971) 836-37; see also Annotation (1952) 21 A.L.R.2d 643, 662-65, 674-79.) Because there was no substantial evidence to support a finding by a reasonable jury that respondents instigated the filing of the criminal complaint, the issue of respondents liability in the trial below should at best have been limited to

damages accruing from the time of arrest to the time of the filing of the complaint and should not have included damages resulting from decisions of the prosecutor and judge over which the officers could not possibly have had any control.

II.

THE COURT OF APPEALS VACATION OF THE DISTRICT COURT JUDGMENT ON THIS ISSUE APPROPRIATELY DISPOSED OF THE ISSUE CONCERNING LIABILITY FOR INSTITUTION OF JUDICIAL PROCEEDINGS.

The development of the common law in a number of American jurisdictions recognized a complete immunity for police officers for the limited activity

of presenting information to a prosecutor who therafter passed upon whether or not a criminal case should be filed. Such an immunity was often regarded as quasi-judicial in its origins since it was conceived to carry forth the same policy of encouraging the fearless submission of issues for resolution by the Courts, as that governing prosecutors and judges. (See for example the reasoning articulated in Imbler v. Pachtman 424 U.S. 409, 428; 47 L.Ed.2d 128, 142; 96 S.Ct. 984 (1977) including the concurrence of Justice White, Id. 424 U.S. 437-39, 47 L.Ed.2d 148-49; Pearson v. Ray 386 U.S. 547, 554; 18 L.Ed.2d 288, 294; 87 S.Ct. 1213 (1967); see also Restatement (Second) of Torts (1977) §653, comment (e), p.408.)

Treatises addressing the subject of the extension of quasi-judicial immunity to police officers when engaged in the presentation of their investigations to the prosecutor provide that although there exists a split of authority the better reasoned rule has supported such an immunity:

> "In the great majority of cases the civil liability of a law enforcement officer has been determined by the decision of whether or not the doctrine of judicial immunity extends to such type of public officer.
>
> While there is a direct conflict of authority on this point, the better view seems

to be that the doctrine is applicable to law enforcement officers and that they therefore are immune from liability for malicious prosecution even though they may have acted maliciously and without probable cause.

The reason for the above-stated rule is that public policy requires that law enforcement officers be protected from harassment by civil actions in the performance of their duty, the efficient functioning of the law enforcement machinery being dependent largely upon the investigation and the

accusation of offenders by properly trained officers."

Annotation, Civil Liability of Law Enforcement Officers For Malicious Prosecution, 28 A.L.R. 2d 646, 649 (1953)

"Prosecuting attorneys themselves, when they merely conduct proceedings on complaints sworn out by others, are held to be quasi-judicial officers, protected by an absolute privilege, and are not liable for malicious prosecution even when they act in bad faith and without probable cause, or overdo the prosecution. The same

immunity is, in general, extended to the police and other law enforcement officers acting within the scope of their duties."

Prosser, Law of Torts, (1971) Ch. 22, Malicious Prosecution §119, p. 837-38

A large number of American cases have followed this rule. (See for example White v. Towers (Cal. 1951) 37 Cal.2d 727, 235 P.2d 209, 28 ALR 2d 636 and cases cited therein and Annotation 28 ALR 2d 646.) However, even those which have not, have never rested liability for the institution of judicial proceedings upon so precarious a footing as did the District Court in

this case. Even in Belt v. Ritter (Mich, 1969) 18 Mich. App. 495, 171 N.W.2d 581; aff'd. 385 Mich 402, 189 N.W.2d 221, a leading Michigan decision rejecting the application of quasi-judicial immunity to police officers engaged in official duties involving the institution of judicial proceedings the court held that a defendant in such a case must be shown to have acted with malicious motives before liability can attach for such acts. The case concluded that:

> "It would thus appear that the only situation in which an action for malicious prosecution would properly lie is where a police officer swears to false facts in a

complaint, without which there is no probable cause."

Belt v. Ritter (1968) 18 Mich App. 495, 171 N.W.2d 581, 586

The present case revolving as it does upon mere negligence simply does not reflect the type of malicious or intentional misconduct which must be proven even in those jurisdictions which permit liability against police officers for malicious prosecution.

III.

THE ISSUE OF THE LIABILITY OF THE RESPONDENTS FOR DAMAGES AFTER INSTITUTION OF JUDICIAL PROCEEDINGS WAS PROPERLY RAISED AND LITIGATED BELOW.

Relying upon Gomez v. Toledo 446 U.S. 635, 64 L.Ed.2d 573, 100 S.Ct. 1920 and Rule 8(c) of the Federal Rules of Civil Procedure, petitioner complains that respondents did not allege as an affirmative defense the fact that the filing of a criminal complaint by the district attorney's office was an independent, intervening, superseding act insulating them from liability for any damage suffered by petitioner thereafter.

It was not necessary for respondents to allege this as an affirmative defense because it was not "avoiding in nature in that it raises matter outside the scope of plaintiff's prima facie case." (2A Moore's Federal Practice (2d ed. 1979) para. 8.19[1],

p.8-221.) The law is clear that the chain of causation between respondents and the filing of the criminal complaint is broken if the decision made by Deputy District Attorney who decided to file a criminal prosecution was independent, and it is presumed that it was independent. (See Ames v. United States (8th Cir. 1979) 600 1.2d 183, 185; Dellums v. Powell (D.C. Cir. 1977) 566 F.2d 167, 192-93.) In order to recover damages arising after the filing of the criminal complaint, it was incumbent upon petitioner to allege and prove that respondents did not leave the decision to prosecute entirely to the uncontrolled discretion of the District Attorney's Office. This obligation was recognized by petitioner; his complaint

alleged "[t]hat the formal institution of criminal proceedings against the plaintiff . . . [was] the direct and proximate result[] of the negligent, malicious, intentional and bad faith actions of defendants. . . ." (C.T. 95:1-6.) The allegation was denied by respondents in their answer to petitioner's complaint. (C.T. 112:19-21.) They also alleged that they acted properly within the scope of their duties as police officers. (C.T. 113) Respondents need not have done more. "[A] defense that merely controverts plaintiff's prima facie case is negative in character and is made, in accordance with subdivision (b) [of Rule 8], by the denial of some or all of the averments upon which plaintiff relies." (2A

alleged "[t]hat the formal institution of criminal proceedings against the plaintiff . . . [was] the direct and proximate result[] of the negligent, malicious, intentional and bad faith actions of defendants. . . ." (C.T. 95:1-6.) The allegation was denied by respondents in their answer to petitioner's complaint. (C.T. 112:19-21.) They also alleged that they acted properly within the scope of their duties as police officers. (C.T. 113) Respondents need not have done more. "[A] defense that merely controverts plaintiff's prima facie case is negative in character and is made, in accordance with subdivision (b) [of Rule 8], by the denial of some or all of the averments upon which plaintiff relies." (2A

Moore's Federal Practice, supra, para. 8.19[1], pp. 8-220 - 8-221; footnotes omitted.)

Even if respondents were required to allege the independence of the prosecutor's filing decision as an affirmative defense this contention would be immaterial in the instant case since the issue was tried by express or implied consent. (3 Moore's Federal Practice, supra, para. 15.13[2], p. 15-165; see Gallegos v. Stokes (10th Cir. 1979) 593 F.2d 372, 374-75; Slavitt v. Kauhi (9th Cir. 1967) 384 F.2d 530, 534, and cases cited.) Petitioner broached the subject of the independence of the prosecutor's action during the trial in his case in chief during the testimony of one of the police officers. (5 R.T.

672:17 - 673:9.) Then respondents' counsel asked the officer questions on this subject without objection by petitioner. (6 R.T. 939:11 - 943:12.) Thus, the issue was tried by implied consent.

In addition, respondents' motion for directed verdict very clearly stated that the prosecutor's independent action insulated defendants from liability for damages accruing thereafter. (C.T. 274.) This afforded petitioner an opportunity to present any additional evidence on this subject. To afford such an opportunity is the principle rationale for the rule that sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made at the close of all the

evidence by the party seeking that review.

> "When a claimed deficiency in the evidence is called to the attention of the judge and of counsel before the jury has commenced deliberations, counsel still may do whatever can be done to mend his case."

(Quinn v. Southwest Wood Products, Inc. (5th Cir. 1979) 597 F.2d 1018, 1024-25.) Petitioner did not take advantage of the opportunity to "mend his case." One can only assume the case was not "mendable." There plainly was no evidence to support a finding that respondents interferred with the District Attorney's exercise of discretion and the Court of Appeals correctly ruled that the presumption of

independant judgment of the prosecutor had thus not been rebutted.

CONCLUSION

For the foregoing reasons respondents submit that the arguments raised in the Cross-Petition for Writ of Certiorari in this matter are simply not meritorious. The Cross-Petition for Writ of Certiorari should be denied.

Dated: August 13, 1982

Respectfully submitted,

IRA REINER, Los Angeles
City Attorney
JOHN T. NEVILLE
Senior Assistant City Attorney
RICHARD M. HELGESON
Assistant City Attorney

By RICHARD M. HELGESON
Assistant City Attorney

Attorneys for Respondents